STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2008
v	No. 275911 Oakland Circuit Court
JERMAINE CURTIS BRANNER, Defendant-Appellant.	LC No. 2006-209376-FH

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

Servitto, J. (*dissenting)*

I respectfully dissent.

I do not quarrel with the majority's conclusion that defendant waived his right to a jury trial and that the trial court essentially complied with the requirements of MCR 6.402 in accepting defendant's waiver. Defendant, when questioned by counsel, stated on the record that he understood that he had a right to a trial by jury and he wished to waive his right to a jury trial and have the judge decide his case. Defendant also acknowledged signing a waiver of trial by jury form, indicating that he read and understood the form before signing it. I do, however, take issue with the events that transpired thereafter.

After defendant's waiver of a jury trial was established, the trial court indicated that it understood that the parties were asking the court to decide the matter as a bench trial. The trial court also indicated its' understanding that rather than having the trial court conduct a bench trial, the parties had stipulated that the preliminary examination transcript and several other documents would be the basis for the trial court's determination. On that issue, the prosecution stated:

> I just would like to have the defendant put on the record that he is agreeable to instead of having the witnesses testify, to use these documents to establish the record for purposes of both the evidentiary hearing and the trial.

Defendant responded, "Yes."

That was the entirety of the exchange with defendant about his understanding of how his "trial" would proceed. The trial court thereafter reviewed the preliminary examination transcript, the

police report, and the toxicology report and issued a written verdict finding defendant guilty as charged.

Again, while I do not disagree with the conclusion that defendant validly waived his right to a jury trial, defendant in actuality waived far more than that here. Defendant effectively waived all of the rights he had at a trial, except to have his guilt determined beyond a reasonable doubt. While there is no court rule that directs a court how to proceed when approached with a waiver such as the one that occurred here, MCR 6.302 addresses a waiver of trial with respect to guilty pleas. That rule provides that before accepting a plea of guilty, the trial court must advise the defendant that he will not have a trial of any kind, and so gives up the rights the defendant would have at trial, including to have the witnesses against the defendant appear at trial, to question the witnesses, to remain silent during trial and not have that silence used against the defendant, and the right to testify at trial.

Where, as here, defendant is giving up those same fundamental rights, he should be advised of the same before his waiver can be accepted. I harbor serious doubts as to whether such a waiver should ever be employed and accepted by a court given that "a trial court sitting as a trier of the facts determines the credibility of witnesses, and has not only the right but the duty to ask material questions of witnesses so as to clarify the matters before it." *People v Jablonski*, 70 Mich App 218, 224; 245 NW2d 571 (1976). At the very least, however, I fail to see how a defendant's waiver of most of the rights associated with a trial could be accepted (or be voluntary and understanding) by a court without the court first ensuring that defendant is advised of exactly what rights he is waiving. All trial courts are, after all, under some obligation to guard and enforce the personal rights secured by our state and federal constitutions. *People v Kamischke*, 3 Mich App 236, 241; 142 NW2d 21 (1966). Because I believe that the procedure employed in this matter to determine defendant's guilt was wholly inadequate and the trial court failed to abide by its obligation to guard and enforce defendant's most basic and fundamental rights, I would reverse.

I would also reverse based upon defendant's claim that counsel was ineffective for stipulating to allow the trial court to decide defendant's case based solely upon the preliminary examination record, the police report, and the toxicology report. The purpose of a preliminary examination is to determine whether probable cause exists to believe that a crime was committed and that the defendant committed it. *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003). Probable cause requires a quantum of evidence "sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief" of the accused's guilt. *People v Justice (After Remand)*, 454 Mich 334, 344, 562 NW2d 652 (1997).

The probable-cause standard of proof is, of course, less rigorous than the guilt-beyond-a-reasonable-doubt standard of proof that governs at a criminal trial. *People v Yost*, 468 Mich 122, 125-126; 659 NW2d 604 (2003). "The gap between these two concepts is broad." *People v Justice*, 454 Mich 334, 344; 562 NW2d 652 (1997).

Given that the prosecution's burden of proof at a preliminary examination is far lower than that at trial, the proceedings are vastly different and the motive in developing witnesses' testimony at preliminary examination is unlike that at trial. The defense often presents less than its full arsenal of defenses and witnesses, often electing, as a matter of trial strategy not to "tip his hand," so to speak, at the preliminary examination. The preliminary examination is, as a

result, generally much shorter than a trial, and enforcement of the rules of evidence is often, as a matter of practice, a little more relaxed at the preliminary examination. Here, in fact, the preliminary examination lasted only 45 minutes, no witnesses of the defense were introduced, and defense counsel cross-examined only one of the prosecution's witnesses. Any counsel that would stipulate to the examination transcripts and a police report (a generally inadmissible document, see, e.g., *People v McDaniel*, 469 Mich 409, 413-414; 670 NW2d 659 (2003)) to serve as a substitute for his client's trial, where the trial court has no opportunity to personally observe and thus evaluate the credibility of witnesses, is, in my view, ineffective.

More importantly, in *People v Ramsey*, 385 Mich 221, 225; 187 NW2d 887 (1971), our Supreme Court announced that "as an absolute rule, it is reversible error for the trial court sitting without a jury to refer to the transcript of testimony taken at the preliminary examination except under exceptions provided by statute." According to the *Ramsey* court, "[a] jury, if impanelled, would not be aware of the testimony taken at a preliminary examination except under the provisions of the statute. A trial judge, sitting as the trier of the facts, can assume no greater prerogatives than a jury if a jury were impanelled to determine the facts." *Id.*

The exceptions provided by statute referenced in *Ramsey*, *supra*, can be found at MCL 768.26, which provides:

> Testimony taken at an examination, preliminary hearing, or at a former trial of the case, or taken by deposition at the instance of the defendant, may be used by the prosecution whenever the witness giving such testimony can not, for any reason, be produced at the trial, or whenever the witness has, since giving such testimony become insane or otherwise mentally incapacitated to testify.

There is no assertion that the witnesses testifying at the preliminary examination in this matter were unavailable to testify at a trial.

True, examination of the preliminary examination transcript by the judge sitting as trier of fact has been upheld where the examination was limited to impeachment purposes and the parties had stipulated that such examination be made. See, e.g., *People v Dorsey*, 45 Mich App 230; 206 NW2d 459 (1973). Here, in contrast, however, the preliminary examination record was allowed to substitute for the entire trial. Further, while MCR 6.110(D) allows for an evidentiary issue to be determined by the trial court on the basis of the preliminary examination transcript alone, we have been directed to no court rule or statute that would allow a similar application to the ultimate determination of guilt or innocence in lieu of a trial.

Because I believe that to allow a criminal case to be decided on a preliminary examination transcript is not in accordance with MCL 768.26 and *Ramsey*, *supra*, and is, in fact, violative of the protections afforded through our judicial process, I would find that counsel was ineffective for advising/allowing the determination of defendant's guilt or innocence to proceed in such a manner. I would further find that defendant was prejudiced by the ineffective assistance of counsel and would therefore reverse.

/s/ Deborah A. Servitto